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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS
and LABORERS LOCAL UNION 261,
Petitioners,

VS.

FREDERICK MEISWINKEL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court may, when reviewing an arbitration award, weigh the merits of the underlying grievance and substitute its judgment for that of the arbitrator because the arbitrator failed to set forth specifically his reasoning justifying his award.

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OCTOBER TERM, 1984

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS
and LABORERS LOCAL UNION 261,
Petitioners,

vs.

FREDERICK MEISWINKEL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Northern California District Council of Laborers and its affiliated Local Union, Laborers Union Local 261, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 9, 1984.

I

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 744 F.2d 1374. The order of the United States District Court for the Northern District of California granting summary judgment (Appendix B, *infra*) was entered on June 22, 1983, and the order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Judgment (Appendix C, *infra*) was entered on August 29, 1983; the orders are not reported.

II

JURISDICTION

The opinion of the court of appeals for the Ninth Circuit was entered on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed with this Court under 28 U.S.C. § 2101(c).

III

STATEMENT OF THE CASE

This action involves a dispute between a Labor Union, Northern California District Council of Laborers (hereinafter District Council of Laborers), and an employer, Respondent, Frederick Meiswinkel, Inc. (hereinafter Meiswinkel), concerning an arbitration award issued pursuant to a collective bargaining agreement between the parties. The arbitrator determined in his award that the employer had violated the terms of the collective bargaining agreement when it employed ten workmen who were not members of Laborers Local Union 261 nor referred by Local 261 to perform work (cleanup of debris) which was specifically covered by the collective bargaining agreement.

On October 15, 1982, Meiswinkel filed a Petition to Vacate Arbitration Award with the United States District Court for the Northern District of California. On March 24, 1983, Meiswinkel filed a Motion for Summary Judgment to Vacate the Arbitration Award, and on April 20, 1983, the District Council of Laborers filed a Cross-Motion for Summary Judgment to Confirm the Arbitration Award. On May 11, 1983, the district court granted Meiswinkel's Motion for Summary Judgment and vacated the arbitration award on the grounds that (a) the award exceeded the arbitrator's

jurisdiction under the contract and (b) the award conflicts with a preeminent decision of the National Labor Relations Board.

On July 11, 1983, the District Council of Laborers filed a Motion for Alteration, Amendment or Vacation of Judgment, which was denied by the district court on August 26, 1983.

Petitioner District Council of Laborers and its affiliated Local Union 261 filed a Notice of Appeal on September 19, 1983, and an Amended Notice of Appeal on September 21, 1983. The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit on July 12, 1984. On October 9, 1984, the Ninth Circuit issued its decision affirming the judgment of the United States District Court vacating the arbitration award on the ground that the award did not draw its essence from the collective bargaining agreement.[1]

IV

STATEMENT OF FACTS

On April 17, 1975, an authorized representative of Meiswinkel signed a Memorandum Agreement with the District Council of Laborers, which executed the Agreement on behalf of itself and its Local Unions, including Local 261, whereby Meiswinkel agreed to be bound by the terms and conditions as set forth in the Laborers' Master Agreement for the 46 Northern California Counties, and all modifications, changes, extensions or renewals thereto.

---

[1]The Ninth Circuit determined that, because it was upholding the decision of the district court vacating the arbitration award on the ground that the arbitrator exceeded his jurisdiction, it was not necessary to reach the issue of whether the National Labor Relations Board's decision was preeminent under the circumstances. Thus, that issue is not before this Court.

Section 1(b) of the Master Agreement between the parties provided that work covered by the Agreement included, *inter alia*, "[a]ll Laborers' work necessary to tend the carpenters and other building trades craftsmen . . . all cleanup of debris, grounds, and buildings . . . and all General Laborers' work. . . ."

Meiswinkel was also bound to a second agreement between the Northern California Drywall Contractors Association and the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (hereinafter Carpenters). The Carpenters Agreement did not provide that the "cleanup of debris" was work covered by that Agreement but, rather, provided that "scrapping" was covered by the Carpenters Agreement.

A dispute arose between the District Council of Laborers and Meiswinkel with respect to Meiswinkel's failure to employ Laborers to perform the work of "cleanup of debris." The Northern California District Council of Laborers filed a grievance on behalf of itself and Local 261 alleging that Meiswinkel, as a sub-contractor for Swinerton and Walberg (a general contractor which is signatory to the Laborers' Master Agreement), violated sections 3A, 3B and 18 of the Laborers' Master Agreement by employing "as Laborers—to perform covered employment—ten workmen who were not members of or referred by Local Union 261" and "by employing these ten workmen at a wage rate less than that negotiated by the Union." As a remedy, the District Council of Laborers requested "payment of a day's lost time wages and fringe benefits for each day of this violation to be paid to the first ten registered as unemployed and possessing the necessary qualifications."

The grievance procedure of the collective bargaining agreement between Meiswinkel and the District Council of Laborers, section 9 thereof, provided for arbitration over "[a]ny dispute concerning the interpretation or application of this Agreement, other than a jurisdictional dispute. . . ." Pursuant to the terms of the grievance procedure of the Agreement, an arbitration was held on November 5, 1981. Representatives of Meiswinkel and the District Council of Laborers attended the hearing, presented both written and oral evidence, presented oral argument and submitted written briefs to the arbitrator.

Meiswinkel took the position that the underlying dispute was a "jurisdictional dispute" and, therefore, was not subject to arbitration under the Laborers' Master Agreement. The District Council of Laborers took the position that the grievance was over the failure of the employer to hire Laborers for "cleanup of debris," and that the dispute was not a jurisdictional dispute in that, as demonstrated by the position letter of the Carpenters which was placed in evidence before the arbitrator, there was nothing in the record upon which a claim of jurisdictional dispute could be based since there was no contrary claim by the Carpenters for "cleanup of debris."

On October 28, 1981, Meiswinkel, through the Northern California Drywall Contractors Association, filed a petition with the National Labor Relations Board, pursuant to section 10(k) of the National Labor Relations Act (29 U.S.C. § 160(k)) alleging that a jurisdictional dispute existed between the Laborers, the Carpenters and the Painters and Decorators Unions.

On July 16, 1982, the arbitrator issued his award, stating as follows:

> "Since the Employer (Meiswinkel) is bound to the Laborers' Memorandum Agreement, the work in issue, i.e., 'cleanup of debris,' falls within the jurisdiction of the Memorandum Agreement. The claim of the Union is therefore sustained.
>
> "With respect to the relief requested by the Union the matter is referred to the parties to resolve the amount of damages. Jurisdiction by the Arbitrator is retained in the event the parties are unable to do so."

Finally, on December 7, 1982, the National Labor Relations Board issued a Decision and Determination of Dispute in Case Nos. 20-CD-584 and 20-CD-585 pursuant to section 10(k) of the National Labor Relations Act (29 U.S.C. § 160(k)). The Board determined that the Bay Counties District Council of Carpenters and the Painters and Decorators Union were entitled to perform the work at issue in the proceedings before the Board. In its Decision and Determination, the Board specifically excluded the Northern California District Council of Laborers, Petitioner herein, from the scope of its award, and stated that the grievance which was the subject of the arbitration award at issue was not unlawfully filed.

V

ARGUMENT

The Decision of the Ninth Circuit Is in Conflict with the Principles Enunciated by This Court in the "Steelworkers' Trilogy," in Conflict with the Decisions of the Various Circuit Courts as Well as the Decisions of the Ninth Circuit Itself, and Places in Jeopardy All Arbitration Awards Where the Arbitrator Does Not Set Forth with Specificity the Reasoning Which Led to the Arbitrator's Decision.

This Court's decisions in the "Steelworkers Trilogy" established the core doctrine that arbitration is the favored

means of resolving labor disputes. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Judicial review of arbitration awards is limited. When the question of arbitrability is resolved in favor of arbitration, the court's only remaining function is to determine whether the arbitration award "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Kewanee Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters*, 593 F.2d 314, 316 (8th Cir. 1979); *Riverboat Casino, Inc. v. Local Joint Executive Board*, 578 F.2d 250, 251 (9th Cir. 1978); and *International Association of Machinists v. Texas Steel Co.*, 538 F.2d 1116, 1120 (5th Cir. 1976). The "essence" tandard is to be interpreted expansively, so as to uphold the award, rather than restrictively. *International Association of Machinists v. Texas Steel Co.*, 538 F.2d at 1121; *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 731-32 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974).

It is well established that, in determining whether the award draws its "essence from the agreement," courts are not to weigh the merits of the grievance nor substitute their judgment for that of the arbitrator.

> "The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568 (footnote omitted).

This Court's announcement of the limited nature of judicial review of arbitration awards has been followed consistently by the circuit courts. The Eighth Circuit has stated:

> "We cannot interfere with the arbitrator's award 'unless it can be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation.' *Intern. Broth. of Elect. Workers v. Prof. Hole*, 574 F.2d 497, 503 (10th Cir. 1978)." *Kewanee Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 593 F.2d 314, 318 (8th Cir. 1979).

The Fifth Circuit has stated:

> "We do not review the merits or the factual and legal accuracy of the arbiter's findings." *International Association of Machinists v. Texas Steel Co.*, 538 F.2d 1116, 1120-21 (5th Cir. 1976).

The Tenth Circuit has stated:

> "We are not empowered to review the merits of an arbitration award which draws its essence from a collective bargaining agreement." *Painters Local Union No. 171 v. Williams & Kelly, Inc.*, 605 F.2d 535, 538 (10th Cir. 1979).

Likewise, the Third Circuit has stated that arbitration awards

> "must not be disturbed so long as they are not in 'manifest disregard' of the law, and . . . 'whether the arbitrators misconstrued a contract' does not open the award to judicial review. . . .
>
> "[A] labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the

> agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention . . ." *Ludwig Honold Manufacturing Co. v. Fletcher,* 405 F.2d 1123, 1128 (3rd Cir. 1969) (citations omitted) (footnotes omitted).

Just last year, this Court reiterated that, in determining whether the award "draws its essence" from the collective bargaining agreement, the question for the court is not whether the arbitrator was correct in his or her analysis. In *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers,* ..... U.S. ....., 76 L.Ed.2d 298, 306 (1983), this Court stated:

> "Regardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it."

The Ninth Circuit has also consistently adhered to this limited scope of review of arbitration awards. In a recent pronouncement concerning the scope of review of arbitration awards, the Ninth Circuit stated as follows:

> "Where the decision involves contractual interpretation, we must defer as to any decision which draws its essence from the agreement. . . . *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 . . . (1960). Therefore, if on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. *Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union,* 412 F.2d 899, 903 (9th Cir. 1969). This remains so even if the basis for the decision is ambiguous, *W. R. Grace & Co.,* ..... U.S. at ....., 103

> S.Ct. at 2182; *Enterprise Wheel & Car Corp.*, 363 U.S. 598, 80 S.Ct. at 1361, and notwithstanding the erroneousness of any factual findings or legal conclusions, absent a manifest disregard of the law. *American Postal Workers v. U.S. Postal Service*, 682 F.2d 1280, 1284 (9th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983)." *George Day Construction Co., Inc. v. United Brotherhood of Carpenters & Joiners of America, Local 354*, 722 F.2d 1471, 1477 (9th Cir. 1984).

Despite the Ninth Circuit's reaffirmation of the limited scope of judicial review of arbitration awards in *George Day Construction*, the Ninth Circuit deviated from that well-established principle in the instant case. In this case, after conceding the arbitrator's right to determine whether he had jurisdiction to hear the underlying grievance, the Ninth Circuit then proceeded to reexamine the merits of the grievance and to substitute its judgment for that of the arbitrator. The court stated:

> "We do not hold that the arbitrator had no right to decide his own jurisdiction. We hold instead that his award was implausible and ignored clear contractual language denying him jurisdiction of this dispute." *Frederick Meiswinkel, Inc. v. Laborers Union Local 261*, 744 F.2d 1374, 1377 (9th Cir. 1984).

In reweighing the merits of the grievance, however, the Ninth Circuit either ignored the evidence which was before the arbitrator or substituted its own contrary interpretation of that evidence for that of the arbitrator.

The employer, in its brief to the Ninth Circuit, set out the testimony which it had introduced in the arbitration in support of its contention that the dispute was a "jurisdictional dispute." The documentary evidence which had

been submitted to the arbitrator was also contained in the excerpt of record before the Ninth Circuit. On the basis of the testamentary and documentary evidence submitted to the arbitrator, he was justified in determining that the dispute did not constitute a jurisdictional dispute.

For instance, the employer's witness testified that Meiswinkel's contract with the Carpenters required "scrapping" and "cleanup" to be awarded to the Carpenters. The documentary evidence, which consisted of the collective bargaining agreement between Meiswinkel and the witness's own employers' association, clearly demonstrated that nowhere in that contract did it provide that "cleanup" was to be done by the Carpenters Union. The collective bargaining agreement between Meiswinkel and the Laborers District Council, on the other hand, specifically provided that "cleanup" was work covered by that agreement.

In support of its contention that the dispute was a jurisdictional dispute, the employer put into evidence a letter (referred to as the "Green letter"), written by a Carpenters official setting forth the Carpenters' position as to the dispute at issue. The so-called "Green letter" made no claim for the "cleanup of debris." The "Green letter" stated that

> "the position of the Bay Counties District Council of Carpenters regarding the work performed by contractors signatory to the Drywall-Lathing Master Agreement is as follows: (1) the scope of work covers all work performed by that contractor. . . ."

The Laborers argued to the arbitrator, and he obviously so found, that it would be impossible for the Carpenters to claim "all work" performed by the signatory contractor for, if the contractor performed painting or plumbing or

electrical work, the Carpenters could not claim such work. Thus, since the employer's reliance upon the "Green letter" as support for its contention that the grievance was a jurisdictional dispute was illogical, the arbitrator was required to interpret the language of both collective bargaining agreements before him to see whether a counterclaim could be established for the work at issue.

The work covered by the Drywall Master Agreement (the Carpenters Agreement) was set out in Article I, section 1 as "[t]he installation, carrying, transportation, handling, stocking and *scrapping* of all materials and component parts . . ." (emphasis added). Nowhere in the Carpenters' Agreement was there a provision for the "cleanup of debris" which was specifically covered in the Laborers' Agreement. The words "scrapping" and "cleanup" are technical terms of art in the construction industry. "Scrapping" means that pieces of material that can be reused are, in fact, saved, cleaned and stockpiled to be reused as scrap by the craft which has the jurisdiction to install the material. The Laborers' Master Agreement specifically refers to the fact that the Laborers "clean up" after all crafts. Thus, the Laborers do all sweeping and all throwing away and dumping of materials.

In interpreting the express language of the collective bargaining agreements, the arbitrator was interpreting terms of art and was applying the "law of the shop" or industry, which is a function reserved for the arbitrator as opposed to the courts. This Court specifically noted with approval this division of functions:

> "Refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under

> collective bargaining agreements. . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in a particular agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596, citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (footnote omitted).

On the basis of the documentary evidence before the arbitrator, and his interpretation of terms and conditions unique to the construction industry, it was reasonable for him to determine that there was no evidence of a conflicting claim for the work at issue, "cleanup of debris," and that the grievance was not a jurisdictional dispute. Thus, he proceeded to determine the grievance on its merits. The award rendered by the arbitrator did not purport to award or assign the work of cleanup of debris to any Union. Rather, the arbitrator found that the employer violated the Agreement when it hired other than Union Laborers to perform that work which was specifically included within the Laborers' Master Agreement and was therefore liable for damages as a result of its violation. Hence, the arbitration award "drew its essence" from the collective bargaining agreement and represented a "plausible interpretation" of that agreement.

Rather than recognizing that the arbitration award represented at least a "plausible interpretation" of the agreement, the court, on review of the award, apparently weighed the merits of the dispute and substituted its own judgment

for that of the arbitrator. The court found that the arbitrator's award was implausible, and that he ignored clear contractual language denying him jurisdiction over the dispute. However, in every case where the arbitration provisions exclude "jurisdictional disputes," and the arbitrator finds the dispute is not a jurisdictional dispute, the award can be seen as contradictory to "clear contractual language denying [the arbitrator's] jurisdiction." The court apparently reweighed the merits of the dispute because the arbitrator did not set forth with particularity the basis of his award or the reasoning which led him to his decision. The Ninth Circuit stated:

> "We recognize that under the collective bargaining agreement, the arbitrator had the authority to decide whether the dispute was in fact jurisdictional. This would have been an act of legitimate contract interpretation under section 9 of the agreement. [Citation] . . . Because the arbitrator failed to rule on Meiswinkel's request that he determine if the dispute was jurisdictional, we do not know whether or how this issue was decided." *Meiswinkel,* 744 F.2d at 1377.

The failure of the arbitrator to set forth his reasoning, however, did not justify the court's making its own determination as to the merits of the dispute. Rather, if the court felt that the award could not be confirmed because of its lack of clarity, the proper procedure would have been to remand the case to the arbitrator for clarification. *See Young Radiator Co. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W.,* 734 F.2d 321, 326 (7th Cir. 1984) ("[w]here the arbitrator has failed to rule on the issue upon which resolution of the parties' dispute should de-

pend, we deem it appropriate to remand to the arbitrator"). *See also Grand Rapids Die Casting Corp. v. Local Union No. 159, U.A.W.*, 684 F.2d 413, 416 (6th Cir. 1982) (where the arbitrator fails to address fully the question presented to him, remand is appropriate). The Seventh Circuit succinctly noted the superiority of the remand procedure, as opposed to the court's undertaking to clarify the decision, even where it appears that the arbitrator may have exceeded his or her authority:

> "An arbitrator's decision need not be free from ambiguity to be upheld, nor need the arbitrator even state reasons for his or her decision. [Citation] But once the reasons that *are* given strongly imply that the arbitrator may have exceeded his or her authority under the submission and contract—whether that implication appears in the form of vague or inconsistent results or possible extensions beyond the terms of the contract —the device of remand is appropriate to avoid having courts rather than the arbitrator clarify the bases for the initial determination. *See generally Locals 2222, 2320-2327, Int'l Brotherhood of Electrical Workers v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 648 (1st Cir. 1980)." *Randall v. Lodge No. 1076, International Association of Machinists and Aerospace Workers, AFL-CIO*, 648 F.2d 462, 468 (7th Cir. 1981) (emphasis in the original).

In the instant case, the Ninth Circuit not only attempted to clarify the bases for the arbitrator's determination but, as well, reweighed the merits of the grievance and substituted its own judgment for that of the arbitrator. This action was directly contrary to the holdings of this Court as enunciated in the "Steelworkers Trilogy," the uniform holdings of the various circuit courts applying the prin-

ciples of the "Steelworkers Trilogy," as well as the holdings of the Ninth Circuit itself.

CONCLUSION

By its actions in this case, the Ninth Circuit has placed in jeopardy arbitration awards which do not specifically set forth the reasoning of the arbitrator to justify his or her decision. This Court has specifically warned of the possible adverse consequences which would result if courts require arbitrators to submit awards free of all ambiguities:

> "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 598 (footnote omitted).

If the decision of the Ninth Circuit in this case is allowed to stand, arbitrators may prefer to submit no supporting opinions to prevent the award from being subjected to attack because of ambiguity, and/or the courts will become enmeshed in the business of reweighing and determining the merits of grievances, a course which will defeat the longstanding principles established by the "Steelworkers Trilogy."

For reasons suggested above, the petition for a writ of certiorari should be granted.

Dated: January 7, 1985.

Respectfully submitted,

VAN BOURG, WEINBERG, ROGER
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APPENDIX A

D E C I D E D

OCT. 9, 1984

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK MEISWINKEL, INC., Petitioner-Appellee, v. LABORER'S UNION LOCAL 261, Laborers' International Union of North America, AFL-CIO; Northern California District Council of Laborers; and Bay Counties District Council of Carpenters & Joiners of America, AFL-CIO, Respondents-Appellants.	NO. 83-2424 D.C. No. C82-5722 SW OPINION

Appeal from the United States District Court for the Northern District of California

Argued and Submitted
July 12, 1984

Before ALARCON and CANBY, Circuit Judges, and STEPHENS*, District Judge.

ALARCON, Circuit Judge:

Laborers' Union Local 261 and the Northern California District Council of Laborers appeal an order from the district court granting summary judgment to vacate an arbitration award.

We must decide whether the district court correctly held that the arbitration award must be vacated because it did not draw its essence from the collective bargaining agreement. Because we conclude that the district court decision was correct on this ground, it is unnecessary for us to decide whether the National Labor Relations Board's decision

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

must be given preeminence under these circumstances.

I PERTINENT FACTS

Frederick Meiswinkel, Inc. (Meiswinkel), a construction contractor, was bound to two separate collective bargaining agreements. Under the Memorandum Agreement between Meiswinkel and appellant Northern California District Council of Laborers, an umbrella organization which includes Laborers Union Local No. 261 (hereafter collectively "Laborers"), Meiswinkel agreed to give the Laborers "[a]ll Laborers' work necessary to tend the carpenters and other building trades craftsmen,...all cleanup of debris, grounds, and buildings,...and all General Laborers' work..." Under the second contract, between the Northern California Drywall Contractors Association (NCDCA),

to which Meiswinkel, as a subcontractor member, was bound, and the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (hereafter collectively "Carpenters"), the Carpenters were entitled to perform "scrapping" or cleanup work.

In September of 1981, Meiswinkel assigned certain cleanup work to the Carpenters. The Laborers, claiming the work was rightfully theirs, picketed the job site in an effort to force Meiswinkel to assign the work to members of their union. When Meiswinkel refused, the Laborers filed a grievance on or about October 2, 1981, alleging that Meiswinkel's failure to employ Laborers for the cleanup work violated their collective bargaining agreement.

On October 28, 1981, Meiswinkel, through the NCDCA, sought a resolution of the jurisdictional dispute from the National Labor Relations Board (NLRB). The NLRB has authority under section 10(k) of the National Labor Relations Act, 29 U.S. C. § 160(k), to make a binding determination on disputes between competing unions, where a union has engaged in threats or coercion to force the employer to assign the disputed work to its members.

On November 5, 1981, arbitrator Koven heard the Laborers' grievance. Only Meiswinkel and Laborers were represented before Koven; the Carpenters were not a party to the hearing. Meiswinkel objected to the arbitrator's authority under section 9 of the Laborers' collective bargaining agreement, which states that the grievance and arbitration mechamism is

invoked for "[a]ny dispute concerning the interpretation or application of this Agreement, other than a jurisdictional dispute..." (emphasis added). Meiswinkel also informed the arbitrator that unfair labor practice charges had been filed with the NLRB against the Laborers in order to resolve the jurisdictional dispute.

On November 17, 1981, the Board gave notice of hearings, and the dispute was heard before the Board on February 2 and 16 and March 10 and 11, 1982. All parties were represented at the Board hearing: the Laborers, the Carpenters, and Meiswinkel.

The arbitration award was issued on July 16, 1982, upholding the Laborers' claim that they were entitled to Meiswinkel's cleanup work. Although Meiswinkel

specifically requested that the arbitrator address the jurisdictional dispute issue, the arbitrator failed to do so. The substance of his award stated: "since the Employer (Meiswinkel) is bound to the Laborers Memorandum Agreement, the work in issue, i.e., 'cleanup of debris,' falls within the jurisdiction of the Memorandum Agreement. The claim of the union is therefore sustained." Meiswinkel moved for reconsideration again challenging authority of the arbitrator to act because the grievance arose from a jurisdictional dispute. The arbitrator did not act on this motion.

On December 7, 1982, the Board issued its section 10(k) determination that scrapping and cleanup work should be assigned to the Carpenters. Based upon this determination, Meiswinkel filed a

Petition to Vacate Arbitration Award against the Laborers in district court, and moved for summary judgment. The Laborers brought a cross-motion for summary judgment to confirm the arbitration award.

The district court granted Meiswinkel's motion for summary judgment on the grounds that "(a) the award exceeded the arbitrator's jurisdiction under the contract and (b) the award conflicts with a preeminent decision of the National Labor Relations Board."

II STANDARD OF REVIEW

Our review of a district court's grant of summary judgment is de novo. Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984).

III ARBITRABILITY

The Laborers contend that the district court erred when it vacated the

arbitration award on the grounds that the arbitrator exceeded his jurisdiction under the contract. They argue that arbitrability is itself an arbitrable issue, and that the award "draws its essence" from the Memorandum Agreement.

"Federal policy generally favors arbitration of labor disputes." Orange Belt District Council of Painters, No. 48 v. Maloney Specialties, Inc., 639 F.2d 487, 490 (9th Cir. 1980). Courts should decline to review the merits of arbitration awards, rendering them unenforceable only when the award does not "[draw] its essence from the collective bargaining agreement." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960).

However, while a general presump-

tion in favor of enforcing arbitration award exists, it is also clear that in the absence of a specific agreement to the contrary, "arbitrability is a matter for the courts to determine." Sheet Metal Workers Local No. 252 v. Standard Sheet Metal, 699 F.2d 481, 483 (9th Cir. 1983); see John Wiley & Sons v. Livingston, 376 U.S. 543, 546-47, 84 S.Ct. 909, 912-13, 11 L.Ed.2d 898 (1964); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n. 7, 80 S.Ct. 1347, 1353 n. 7, 4 L.Ed.2d 1409 (1960); Aluminum Company of America v. International Union, etc., 630 F.2d 1340, 1342 (9th Cir. 1980); Amalgamated Clothing and Textiles Workers Union v. Ratner Corporation, 602 F.2d 1363, 1368 (9th Cir. 1979); Leyva v. Certified Grocers of California, 593 F.2d 857, 861 (9th Cir.), cert. de-

nied, 444 U.S. 827, 100 S.Ct. 51, 62 L. Ed.2d 34 (1979); see also Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F. 2d 580, 583-84 (5th Cir. 1980); Carpenters District Council v. Brady Corp., 513 F.2d 1, 3 (10th Cir. 1975).

In deciding arbitrability, "[t]he judicial inquiry...must be strictly confined to the question whether the reluctant party did agree...to give the arbitrator power to make the award he made," United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 582, 80 S.Ct. 1353. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," Id. In this case, the parties did not agree to

submit jurisdictional disputes to arbitration. The collective bargaining agreement specifically excluded jurisdictional disputes. Since the arbitrator decided an issue which was the subject of a jurisdictional dispute, i.e. whether the Laborers were entitled to perform cleanup work, the award is unenforceable. "[I]t is of course fundamental that an arbitrator may decide only those issues submitted to arbitration, and that courts will refuse to enforce an award when the arbitrator exceeds its power." International Association of Machinists and Aerospace Workers v. Texas Steel Co., 639 F.2d 279, 283 (5th Cir. 1981).

We recognize that under the collective bargaining agreement, the arbitrator had the authority to decide whether the dispute was in fact jurisdictional. This

would have been an act of legitimate contract interpretation under section 9 of the agreement. See Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union, 345 F.2d 757, 760-61 (9th Cir. 1965)(arbitrator must first rule on jurisdiction, then courts may review that ruling). Because the arbitrator failed to rule on Meiswinkel's request that he determine that the dispute was jurisdictional, we do not know whether or how this issue was decided. We do not hold that the arbitrator had no right to decide his own jurisdiction. We hold instead that this award was implausible and ignored clear contractual language denying him jurisdiction of this dispute. "We enforce an arbitration award if it represents a 'plausible interpretation of the contract in the context of the par-

ties' conduct." An award that conflicts directly with the contract cannot be a 'plausible interpretation.'" Pacific Motor Trucking v. Automotive Machinists Union, 702 F.2d 176, 177 (9th Cir. 1983) (citations omitted). See also Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, 724 F.2d 1217, 1221-22 (6th Cir. 1984); Mediterranean Enterprises, Inc. v. Ssangyong, 708 F.2d 1458 1465 (9th Cir. 1983).

It is clear from the uncontroverted facts in the record that the dispute was jurisdictional. The Carpenters' and Laborers' Unions both felt that they were entitled to perform the cleanup work. The employer was caught between rival demands. The NLRB, deciding this same dispute, found it to be jurisdictional. Bay Counties District Council of Carpenters,

265 NLRB 646 (1982).

The contractual language forbade the arbitrator to decide this dispute. Since "[t]he arbitrator's authority is circumscribed by the arbitration agreement, and he can bind the parties only on those issues that they have agreed to submit to him," Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d 580, 583 (5th Cir. 1980), the district court did not err in its determination that the award is unenforceable.

IV CONCLUSION

Because the arbitrator's award did not draw its essence from the collective bargaining agreement, the judgment of the district court is AFFIRMED.

APPENDIX B

F I L E D

June 22, 1983

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK MEISWINKEL, INC., Petitioner, vs. LABORERS UNION LOCAL 261 et al., Respondents.	)Case No. C82-5722 SW)ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION FOR SUMMARY JUDGMENT)May 18, 1983)9:30 a.m.

This matter was regularly heard on May 18, 1983. Satisfactory proof having been made and good cause appearing,

IT IS ORDERED THAT:

1. Summary judgment be granted to petitioner and the arbitration award in

question be vacated, on the grounds that a) the award exceeded the arbitrator's jurisdiction under the contract and b) the award conflicts with a preeminent decision of the National Labor Relations Board;

2. The summary judgment motion of respondent Laborers' Union Local 261 and said respondent's request to confirm the arbitration award be denied;

3. Petitioner be awarded costs of suit.

Dated: 6-21-83

/s/Spencer Williams
United States District
Court Judge

APPENDIX C

F I L E D

Aug. 29, 1983

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK MEISWINKEL, INC., Petitioner, v. LABORERS UNION LOCAL 261, et al., Respondents.	Case No. C82-5722 SW ORDER DENYING RESPONDENT'S MOTION FOR ALTERATION, AMENDMENT, OR VACATION OF JUDGMENT

GOOD CAUSE NOT HAVING BEEN SHOWN for Respondent's Motion for Alteration, Amendment or Vacation of Judgment, Respondent's Motion IS HEREBY DENIED.

Dated: 8/26/83

/s/Spencer Williams
United States District
Court Judge

Office - Supreme Court, U.S.
FILED
FEB 8 1985
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-1106

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND LABORERS LOCAL UNION 261,
Petitioners,

v.

FREDERICK MEISWINKEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FREDERICK MEISWINKEL, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court correctly vacated an arbitration award because it did not draw its essence from the collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 744 F.2d 1374. The order of the United States District Court for the Northern District of California granting summary judgment (Pet. App. B) was entered on June 22, 1983, and the order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Judgment (Pet. App. C) was entered on August 29, 1983; the orders are not reported.

JURISDICTION

The opinion of the court of appeals for the Ninth Circuit was entered on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Vacating the decision of an arbitrator, the United States District Court found that "the award exceeded the arbitrator's jurisdiction under the contract."[1] The District Court's findings are based on the following facts.

Frederick Meiswinkel, Inc. ("Meiswinkel"), a construction contractor, was bound to a collective bargaining agreement with Petitioners Northern California District Council of Laborers, and Laborers Union Local No. 261 ("Laborers"). That agreement describes the work jurisdiction of Petitioners as "[a]ll Laborers' work necessary to tend the carpenters and other building trades craftsmen . . . all cleanup of debris, grounds, and building . . . and all General Laborers' work. . . ."

Meiswinkel was also bound to a collective bargaining agreement with the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America ("Carpenters"). Under that agreement the Carpenters' work jurisdiction includes "scrapping" or "cleanup" work.

In September of 1981, Meiswinkel assigned certain cleanup work to the Carpenters. As a result, the Laborers

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[1] The United States District Court also held that the award conflicts with a preeminent decision of the National Labor Relations Board. As the Ninth Circuit concluded that the District Court correctly vacated the award on the ground that it did not draw its essence from the collective bargaining agreement, it found it unnecessary to decide whether the National Labor Relations Board's decision must be given preeminence.

picketed the job site in an effort to force Meiswinkel to reassign the work from employees represented by the Carpenters to employees represented by the Laborers. Meiswinkel sought a resolution of the dispute from the National Labor Relations Board (NLRB).[2]

A hearing was conducted by the NLRB pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k), at which the Laborers, Carpenters and Meiswinkel were represented. On December 7, 1982, the Board issued its Section 10(k) determination, awarding the scrapping and cleanup work to the Carpenters.

Meanwhile, during the period that the jurisdictional dispute was pending before the NLRB, the Laborers pursued a grievance to arbitration alleging that Meiswinkel's failure to employ Laborers for the cleanup work violated their collective bargaining agreement. Throughout the grievance proceeding, Meiswinkel objected to the arbitrator's authority to decide this issue on the ground that Section 9 of the Laborers' collective bargaining agreement limits access to the grievance and arbitration mechanism to "[a]ny dispute concerning the interpretation or application of this Agreement *other than a jurisdictional dispute* . . ." (emphasis added). Meiswinkel informed the arbitrator that the dispute was a jurisdictional dispute and that the work assignment issue was before the NLRB for determination.

On July 16, 1982, the arbitrator issued his award upholding the Laborers' claim that they were entitled to Meiswinkel's cleanup work. The arbitrator held that "since the

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[2] The NLRB has authority under Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k), to make a determination on jurisdictional disputes between competing unions, where a union has engaged in threats or coercion to force the employer to assign the disputed work to its members. *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116 (1971).

Employer (Meiswinkel) is bound to the Laborers Memorandum Agreement, the work in issue, i.e., 'cleanup of debris,' falls within the jurisdiction of the Memorandum Agreement. The claim of the union is therefore sustained."

Although Meiswinkel had specifically requested the arbitrator to address the jurisdictional dispute issue he failed to do so. Meiswinkel moved for reconsideration, again challenging the authority of the arbitrator to act because the grievance arose from a jurisdictional dispute. The arbitrator did not act on that motion.

When the NLRB issued its Section 10(k) determination, finding the existence of a jurisdictional dispute and awarding the scrapping and cleanup work to the Carpenters, Meiswinkel filed a Petition to Vacate Arbitration Award and successfully moved for summary judgment. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court vacating the arbitrator's award.

ARGUMENT

The decision of the court of appeals vacating the arbitrator's award is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is unwarranted.

1. The courts below concluded that the arbitrator's award did not draw its essence from the collective bargaining agreement because it was in direct conflict with contractual language denying the arbitrator power to decide jurisdictional disputes. Petitioners do not challenge the well-established principle that an arbitrator's award is legitimate "only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United*

but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Rather, they contend (Pet. 7) that in determining that the dispute was in fact jurisdictional the Ninth Circuit inappropriately "reweighed the merits of the grievance and substituted its own judgment for that of the arbitrator" (Pet. 15).[3] Petitioners' contention is erroneous.

The Ninth Circuit acknowledged that "[c]ourts should decline to review the merits of arbitration awards . . ." leaving the question of contract interpretation to the arbitrator. (Pet. App. A9). *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, (1960). But, the courts must decide whether the parties agreed to arbitrate the grievance or to give the arbitrator power to make the award he made. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Pacific Motor Trucking Co. v. Automotive Machinists Union*, 702 F.2d 176 (9th Cir. 1983).[4] Mindful of this obligation, the court of appeals

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[3] Respondent does not dispute Petitioners' argument (Pet. 6-10) that under the holdings of this Court in the "Steelworkers Trilogy" the courts must not weigh the merits of a grievance or substitute its judgment for that of the arbitrator. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). But, as discussed *infra*, the courts below did not do so. Therefore, contrary to Petitioners' assertion, the decision of the Ninth Circuit herein does not conflict with the holdings of this Court or of any other circuit.

[4] The cases cited by Petitioners (Pet. 8-10) are not in conflict. *Kewanee Machinery Division v. Local Union No. 21, IBTCW&H of A*, 593 F.2d 314 (8th Cir. 1979) (court decided whether arbitration award drew its essence from the contract); *International Association of Machinists v. Texas Steel Co.*, 538 F.2d 1116 (5th Cir. 1976) (when an arbitration award has been made, the courts are concerned with whether the dispute was actually arbitrable and whether dispute drew its essence from the agreement); *Painters Local Union No. 171 v.*

appropriately limited its inquiry to whether the issue before the arbitrator involved a jurisdictional dispute and was thus not arbitrable.

The court recognized the arbitrator's authority to decide whether the dispute was jurisdictional but found that he did not do so (Pet. App. A12). In the absence of such a ruling by the arbitrator, the court "[did] not know whether or how this issue was decided" (Pet. App. A13). In these circumstances, the court was called upon to decide, in the first instance, if the issue involved a jurisdictional dispute.

The court found that "[i]t is clear from the uncontroverted facts in the record that the dispute was jurisdictional" (Pet. App. A14). In reaching that decision, the court did not have to review the merits of the arbitration award or substitute its judgment for that of the arbitrator. Rather, it did so upon the arbitrator's failure to rule on the issue. (Pet. App. A13).

Based on its finding that the dispute was jurisdictional, the court concluded that the arbitrator's award "was implausible and ignored clear contractual language denying him jurisdiction . . ." (Pet. App. A13). It therefore vacated the award because it did not draw its essence from the collective bargaining agreement. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582 (1960). The opinion of the circuit court is

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Williams & Kelley, Inc., 605 F.2d 535 (10th Cir. 1979) (court will not review merits of arbitration award which draws its essence from a collective bargaining agreement); *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969) (court review is confined to question whether parties agreed to arbitrate or gave arbitrator power to make the award); *George Day Construction Co. v. United Brotherhood of Carpenters, Local 354*, 722 F.2d 1471 (9th Cir. 1984) (court is charged with the duty of deciding the issue of arbitrability).

consistent with well-established precedent and raises no issue of law requiring resolution by this Court.

2. Petitioners apparently disagree with the conclusion of the courts below that the arbitrator failed to decide whether the issue before him involved a jurisdictional dispute. They contend that the arbitrator *de facto* decided that the dispute was not jurisdictional in that he proceeded to decide the issue on its merits (Pet. 13).[5] Petitioners merely challenge the finding of the lower courts to the contrary. Whether the arbitrator decided this question presents a factual issue not warranting further review by this court. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951).

3. Petitioners also suggest that if the court felt that the award could not be confirmed "because of its lack of clarity," the case should have been remanded to the arbitrator for clarification (Pet. 14). But, the court vacated the award because it ignored the clear contractual language denying the arbitrator jurisdiction to decide the dispute, not because the award was ambiguous or lacking in clarity.

Further, if the case were remanded and the arbitrator found the dispute not to be jurisdictional, such conclusion would be in direct conflict with the preeminent decision of the National Labor Relations Board. The NLRB found the dispute to be jurisdictional and awarded the work to the Carpenters.[6] If the Board had found that no jurisdictional dispute existed because the unions were not in competition over a work assignment, as Petitioners contend herein, it would have dismissed the Section 8(b)(4)(D) charge and

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[5] On this premise, they argue that in finding the dispute to be jurisdictional, the lower courts necessarily "reweighed" the evidence and "substituted its judgment for that of the arbitrator."

[6] *Bay Counties District Council of Carpenters*, 265 NLRB 646 (1982).

quashed the Section 10(k) notice of hearing. *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. at 135 (1971). But, where the Board has issued a decision in a jurisdictional dispute, that decision takes precedence over a conflicting arbitration award of the work in question. *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755 (5th Cir. 1966). See also, *Cannery Warehouseman v. Haig Berberian, Inc.*, 623 F.2d 77 (9th Cir. 1980). Accordingly, remand would not be appropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 6, 1985

Respectfully submitted,

SCHACHTER, KRISTOFF, ROSS, SPRAGUE & CURIALE

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